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In The
Supreme Court of the United States
October Term, 1990

BEVERLY ANN COOK, CLAUD RICHARD DOTY,
WENDELL L. SMITH, JR., and LINDA SMITH WEST,

Petitioners,

vs.

ARAMINTA McCULLOUGH; C & N LEASING
AND RENTAL CO., INC.; JIM ED CLARY,
PROPERTY ASSESSOR OF THE METROPOLITAN
GOVERNMENT; BILL GARRETT, TRUSTEE OF
DAVIDSON COUNTY; and MULTIMEDIA, INC.
d/b/a THE NASHVILLE RECORD,

Respondents.

On Petition For A Writ Of Certiorari
To The Tennessee Court Of Appeals

AMICUS BRIEF OF THE STATE OF TENNESSEE IN
OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the petitioners' constitutional challenge to the validity of Tenn. Code Ann. § 67-2018 [1976 Replacement] was adequately presented to the state courts and is therefore properly reviewable by this Court.

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS.....	2
SUMMARY STATEMENT OF AMICUS CURIAE'S POSITION	2
ARGUMENT	2
CONCLUSION	6

TABLE OF AUTHORITIES

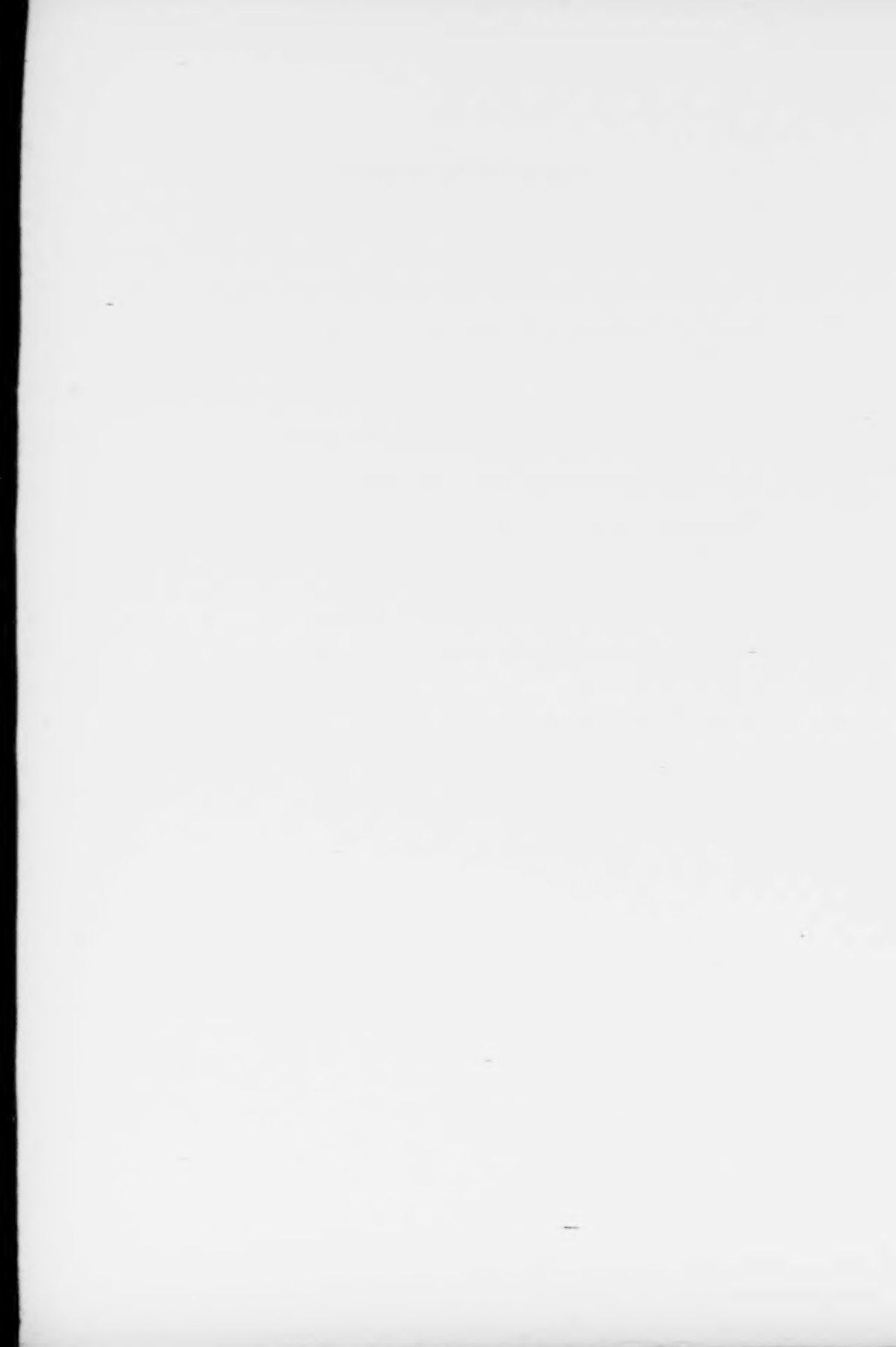
Page

CASES:

<i>Bender v. City of Rochester</i> , 765 F.2d 7 (2d Cir. 1985)	4
<i>Board of Directors of Rotary Int'l v. Rotary Club of Duarte</i> , 481 U. S. 537 (1987)	3
<i>Davis Oil Co. v. Mills</i> , 873 F.2d 774 (5th Cir. 1989)	5
<i>Lawrence v. Stanford</i> , 655 S.W.2d 927 (1983)	3
<i>Lehr v. Robertson</i> , 463 U.S. 248 (1983)	5
<i>Mennonite Board of Missions v. Adams</i> , 462 U.S. 791 (1983)	4, 6

CONSTITUTIONAL PROVISIONS AND STATUTES:

Fourteenth Amendment to the United States Constitution	2
Tenn. Code Ann. § 67-2018 [1976 Replacement]	2, 5
Tenn. Code Ann. § 8-6-109(b)(9)	3



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The State of Tennessee, through Charles W. Burson,
Attorney General, respectfully requests that this Court
deny the petition for writ of certiorari seeking review of
the decision of the Tennessee Court of Appeals dated

December 29, 1989. That opinion is found in Appendix C to the Petition (Pet. App., A-7).

STATEMENT OF FACTS

The State of Tennessee as amicus curiae adopts the Statement of Facts contained in the Brief of Respondent Multimedia, Inc. d/b/a *The Nashville Record*.

SUMMARY STATEMENT OF AMICUS CURIAE'S POSITION

The position of the State of Tennessee as amicus curiae is that the petitioners failed to raise the constitutional issue in the state courts and are therefore precluded from raising it in this Court. This failure means that a sufficient record was not developed to allow this Court to rule on the constitutional issue.

The requirement of Tenn. Code Ann. § 67-2018 [1976 Replacement] that a property owner register his name and address with the county tax assessor in order to receive actual notice of the sale of the property for delinquent taxes does not on its face violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

It is well settled that this Court will not review a final judgment of a state court unless the record clearly shows

that the federal claim was adequately presented to the state courts. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987). In the instant case the record indicates that the petitioners' constitutional claim was not presented to the state court.

It is the general rule in Tennessee that questions not raised in the trial court will not be entertained on appeal. This rule applies to a constitutional attack upon a statute unless the statute is obviously unconstitutional on its face. *Lawrence v. Stanford*, 655 S.W.2d 927 (1983). In the instant case the Tennessee courts properly did not consider the statute attacked by the petitioners to be unconstitutional on its face.

It is the statutory duty of the Tennessee Attorney General to defend the constitutionality of statutes enacted by the General Assembly. Tenn. Code Ann. § 8-6-109(b)(9). Tennessee Rule of Civil Procedure 24.04 requires that when the validity of a statute is drawn in question, notice must be given to the Attorney General, specifying the pertinent statute.

When notice is properly given, the Attorney General then must decide whether in his opinion the statute is unconstitutional, "in which event he shall so certify to the speaker of each house of the general assembly." Tenn. Code Ann. § 8-6-109(b) (9). In the instant case such notice was not given; therefore, the case was tried and appealed without the knowledge or participation of the Attorney General.¹

¹ Upon the remand from the Tennessee Supreme Court to the trial court, the petitioners attempted to amend their

As a result of the petitioners' failure timely to raise the constitutional issue and to notify the Attorney General, the record was not compiled with this issue in mind. It is therefore impossible in the present state of the record to determine, for example, the extent of the burden that would have been placed upon the respondent county officials to ascertain the names of the petitioners from the public records. The State of Tennessee submits that this would be crucial in deciding the constitutional issue.

The State of Tennessee submits that this Court should not decide the constitutionality of a state statute before the state courts have had the opportunity to pass on it. The record should be developed on the constitutional issue with the Attorney General's participation before any court decides it. Otherwise, the decision would be made in a factual vacuum. In the instant case, the absence of a factual record compiled with the constitutional issue in mind is particularly crucial. The case of *Bender v. City of Rochester*, 765 F. 2d 7 (2d Cir. 1985), illustrates this. There, the question was also whether the local government was required to notify certain owners of real property that tax foreclosure proceedings had been instituted against their property. The property owners in question were distributees of a decedent's property. The court held that their names were not reasonably ascertainable under *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983),

(Continued from previous page)

complaint to allege the unconstitutionality of the statute and to give notice to the Attorney General, but the motion to amend was properly denied by the Chancellor as being beyond the scope of the remand. (Pet. App., at A-58)

because a routine examination of land records would not necessarily have revealed their identities.

The very same considerations apply in the instant case since the petitioners are distributees of the estate of the record owner of the property in question. As in *Bender*, it is not unreasonable to require that the executor of the estate or the beneficiaries notify the tax assessor of their claims.

Also illustrative of this point is *Lehr v. Robertson*, 463 U.S. 248 (1983), in which the putative father was held not entitled to notice of adoption proceedings when he had failed to register with the state's Putative Father Registry in accordance with statute. This Court noted that the right to receive notice was completely within the putative father's control. The Court stated: "The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights." *Id.* at 265. The failure of the instant petitioners properly to raise their due process claims precluded the development of the facts with respect to the interest involved.

The State of Tennessee also relies upon *Davis Oil Co. v. Mills*, 873 F.2d 774 (5th Cir. 1989), wherein the court upheld a statute similar in effect to Tenn. Code Ann. § 67-2018 and stated:

The act of requesting notice under the statute does not . . . impose a burden of constant vigilance on the property owner. Rather, it allows one whose identity as an interest holder may not otherwise be readily ascertainable to protect his or her interest in the subject property through a single, simple act. We therefore do not

believe that our limited reliance on RS13:3886 runs afoul of *Mennonite*.

Id. at 791 (footnote omitted). The court further stated:

[T]he reasonableness of constructive notice in a particular case may turn on the nature of the property interest at stake and the relative ease or difficulty of identifying such interest holders from the land records and also on the existence of alternative means of insuring the receipt of notice.

Id. Here, the record has not been developed, and it is therefore impossible to determine the relative ease or difficulty of identifying the petitioners from the land records.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for a Writ of Certiorari to the Tennessee Court of Appeals.

Respectfully submitted,

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